Supreme Court, U.S.
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No. 08-____

IN THE

Supreme Court of the United States

RICHARD GARRETT TURAY,

Petitioner,

v.

HENRY RICHARDS, DR., PH.D.; JOHN TAYLOR-ANDERSON, individually and in his official capacity at the Special Commitment Center at Monroe, WA; JOAN KIRCHOFF; KAREN SULLIVAN; PETE HAZEL, each in their individual capacity and in their official capacity as employees of the Department of Social and Health Services; RICHARD BOSSE, in his individual capacity and in his official capacity as an employee of the Department of Corrections; ANDRE SIMON; DENNIS BRADDOCK, Secretary of the Department of Social and Health Services,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What are the requirements for a constitutionally -adequate treatment program for civilly-committed sex offenders?

2. May a court dissolve a civil rights injunction based on a finding that there is no current constitutional violation even though it finds that defendants are not complying with the terms of the injunction and there is a likelihood that defendants will engage in future constitutional violations?

3. May a court dissolve a civil rights injunction without first conducting an evidentiary hearing where the relevant facts are in dispute?

PARTIES TO THE PROCEEDING

Petitioner is Richard Garrett Turay. Respondents are Henry Richards; John Taylor-Anderson, individually and in his official capacity at the Special Commitment Center at Monroe, Washington; Joan Kirchoff, Karen Sullivan, and Pete Hazel, each in their individual capacity and in their official capacity as employees of the Washington Department of Social and Health Services; Richard Bosse, in his individual capacity and in his official capacity as an employee of the Department of Corrections; Andre Simon; and Dennis Braddock, Secretary of the Department of Social and Health Services.

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RICHARD GARRETT TURAY,

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HENRY RICHARDS, DR., PH.D.; JOHN TAYLOR-ANDERSON, individually and in his official capacity at the Special Commitment Center at Monroe, WA; JOAN KIRCHOFF; KAREN SULLIVAN; PETE HAZEL, each in their individual capacity and in their official capacity as employees of the Department of Social and Health Services; RICHARD BOSSE, in his individual capacity and in his official capacity as an employee of the Department of Corrections; ANDRE SIMON; DENNIS BRADDOCK, Secretary of the Department of Social and Health Services,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Garrett Turay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a)[1] is unreported. The judgment of the district court (Pet. App. 7a-8a) is likewise unreported.

JURISDICTION

The court of appeals rendered its decision on January 29, 2009 (Pet. App. 1a), and denied a timely petition for rehearing and rehearing *en banc* on March 24, 2009 (Pet. App. 24a-25a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

Title 42, section 1983 of the United States Code, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

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[1] This Petition employs the following citation conventions: "Pet. App." refers to the appendix attached pursuant to Supreme Court Rule 14.1(i). "ER" refers to items in the excerpts of the record filed with the court of appeals. "Doc. No." followed by the document number refers to items in the district court record.

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Washington's civil commitment statute, WASH. REV. CODE CH. 71.09 *et seq.*, provides in pertinent part:

> (2) Any person committed pursuant to this chapter has the right to adequate care and individualized treatment. The department of social and health services shall keep records detailing all medical, expert, and professional care and treatment received by a committed person, and shall keep copies of all reports of periodic examinations made pursuant to this chapter. All such records and reports shall be made available upon request only to: The committed person, his or her attorney, the prosecuting attorney, the court, the protection and advocacy agency, or another expert or professional person who, upon proper showing, demonstrates a need for access to such records.

WASH. REV. CODE ch. 71.09.080(2).

STATEMENT

This case involves the dissolution of "a history-making injunction" that governed treatment of

residents who are civilly committed at Washington's Special Commitment Center ("SCC") for over fifteen years. (*See* Pet. App. 7a) This Court has previously recognized the importance of the injunction at issue here – indeed, the Court has cited the injunction as supporting the validity of Washington's civil commitment statute for sex offenders. *See Seling v. Young*, 531 U.S. 250, 265-66 (2001). Notwithstanding nearly two decades of litigation, and the entry of an injunction against Respondents, the history of this litigation is one of repeated and continuing constitutional shortcomings. The courts have long recognized the State of Washington's "repeated and documented failures to rectify the constitutional shortcomings of its civil commitment facilities for sex offenders," *Cunningham v. David Special Commitment Center*, 56 Fed. Appx. 393, 394 (9th Cir. Feb. 19, 2003), and in particular the SCC's "history of noncompliance" with the injunction at issue here. *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000).[2] As a result of

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[2] The SCC's ongoing constitutional violations have also been the subject of significant academic commentary. *See, e.g.*, Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383 (2008) (discussing history of the Washington litigation); Connor, *Seling v. Young: Constitutionally Protected But Unjust Civil Commitment for Sexually Violent Predators*, 18 J. CONTEMP. HEALTH L. & POL'Y 511, 526 (2002) ("The SCC has . . . taken no action to comply with constitutionally required and statutorily mandated conditions, including much needed mental health treatment."); Cornwell, *The Right to Community Treatment for Mentally Disordered Sex Offenders*, 34 SETON HALL L. REV. 1213, 1215 (2004) (the SCC has "fail[ed] to provide constitutionally adequate treatment"); Janus & Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 374 (2003) ("conditions and treatment in the SVP program fell below constitutional standards"); La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ.

that history – and in contrast to similar programs in other States – only *one* resident has *ever* been successfully treated and released from the SCC in its seventeen years of operation.

Petitioner Richard Garrett Turay has been a resident at Washington's SCC for over fifteen years. Mr. Turay and other residents brought this action because the conditions of confinement at the SCC violated their civil rights. In 1994, the district court presided over a trial in which a jury found that the SCC was not providing constitutionally-adequate treatment to Mr. Turay and other residents. As a result of these proceedings, the Honorable William L. Dwyer issued an injunction requiring the SCC to bring its treatment program into compliance with constitutional requirements (the "Turay Injunction"). (ER1252-56)

The Turay Injunction was "broad" (Pet. App. 8a) and required defendants to, among other things, adopt and implement a plan for hiring and training competent therapists; implement strategies to rectify the lack of trust between the residents and staff; implement a general treatment program for residents, including involvement of spouses and family members and all other generally accepted therapy components; develop individual treatment plans for each resident to measure progress; and provide an expert in treatment of sex offenders to supervise and consult with treatment staff. (ER1255-56; *see also Seling*, 531 U.S. at 265-66 (describing the requirements of the Turay

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L. REV. 375 (1999) ("[t]he treatment environment at SCC has severely hampered any attempt to meet constitutional standards").

Injunction)) Because the SCC was slow to comply with the Turay Injunction, the Court appointed a special master, Dr. Janice Marques, to oversee defendants' compliance and submit periodic reports. (ER1247-48)

The defendants made little or no progress, notwithstanding the injunction and the appointment of a special master. In October 1998, Judge Dwyer conducted an evidentiary hearing to assess the defendants' compliance, and subsequently issued an order finding that the SCC had not complied with constitutional requirements. (*See* ER1203-20) The order set forth a detailed list of problems that defendants were required to address. Among other things, the court ruled that the SCC had to provide additional staff training; develop coherent and individualized treatment programs for the residents; make adequate provision for residents' families to participate in rehabilitation efforts; construct a separate treatment-oriented facility; eliminate routine strip searches of SCC residents; eliminate monitoring of residents' telephone calls and the SCC's bar on outgoing calls; obtain better meal and activity schedules; improve the treatment environment; implement fair and reasonable grievance procedures and behavior management plans; and implement a program of oversight both by an internal review process and by an external body. (*See* ER1212-16) Such steps were necessary for the defendants to establish a constitutionally-adequate program. (*See id.*) Noting the defendants' "history of noncompliance with the Turay Injunction," the Ninth Circuit affirmed Judge Dwyer's Order and held that the SCC was providing constitutionally-inadequate treatment. *Sharp*, 233 F.3d at 1173.

The defendants continued to provide constitutionally- inadequate treatment even after the Ninth Circuit issued its ruling. In November 1999, following another evidentiary hearing, Judge Dwyer held defendants in contempt for failing to take reasonable steps to comply with the injunction. (ER1171-93, ER1194-99) Contempt sanctions continued to accrue for the next several years, while the defendants continued to fail to comply with the court's orders. (*See* ER1149-70)

After Judge Dwyer's death in 2000, the case was reassigned to Judge Barbara Rothstein and then Judge Robert Lasnik. (*See* Doc. No. 1591; Doc. No. 1798) In June 2004, Judge Lasnik dissolved many aspects of the Turay Injunction and purged Judge Dwyer's 1999 contempt order. (ER992-1001) Nonetheless, he found that defendants had failed to meet constitutional requirements with respect to "the development and funding of an off-island LRA," or "Less Restrictive Alternative" community placement to facilitate residents' transition back into the community upon successful treatment. (ER993, ER999) He further held that the dissolution of the other requirements of the injunction was subject to the condition that "there is no significant 'backsliding'" by the SCC in meeting the injunction's original requirements. (ER1001) The Ninth Circuit affirmed the district court's Order. *Cunningham v. Weston*, 180 Fed. Appx. 644 (9th Cir. May 9, 2006).

The district court continued to monitor the SCC's compliance with the Turay Injunction, and in particular its development and implementation of an off-island LRA After the case was reassigned to Judge Ricardo Martinez, defendants moved for

dissolution of the injunction. Plaintiffs submitted extensive evidence demonstrating that the SCC had engaged in prohibited "backsliding," including reports issued by the Inspection of Care Committee ("IOC committee" or "IOCC") comprised of independent experts appointed by the SCC, which found that the facility's treatment program was inadequate; a declaration from the head of the committee confirming that the SCC's treatment program did not meet constitutional requirements; several affidavits from residents documenting SCC violations; and a recommendation by Dr. Janice Marques, the former special master, that "judicial supervision should not end until there is a clear demonstration that external oversight of the program is working as the Court intended." (ER195-96)

Nonetheless, the district court denied plaintiffs' request for an evidentiary hearing (Pet. App. 20a-21a), and on March 23, 2007, the court dissolved the "history-making injunction" (Pet. App. 7a). The court specifically found that the SCC had continued to engage in prohibited "backsliding," a situation the court characterized as "serious" and "troubling". (Pet. App. 13a, ER75-76) The court acknowledged that the issues plaintiffs raised were "serious" and that it shared the "sense of frustration obviously felt by Mr. Turay and the [other] residents." (ER75-76) Nonetheless, the court dismissed plaintiffs' objections, summarily stating without explanation that defendants' backsliding did not "rise to the level of a Constitutional violation" and dissolved the injunction because, while plaintiffs disputed that the SCC had implemented an effective LRA protocol, there was "no dispute" that defendants had constructed an off-island LRA. (Pet. App. 11a-14a)

On January 29, 2009, a panel of the Ninth Circuit Court of Appeals affirmed the district court in an unpublished decision. The court of appeals acknowledged that "conditions at the SCC are far from ideal," that independent experts reviewing the SCC "harshly criticize[d] the current treatment program," and that there were "discouraging trends, including decreasing treatment program participation rates and rising allegations of staff abuse." (Pet. App. 4a-5a) Nonetheless, the court of appeals held that the district court did not err in dissolving the injunction. In doing so, the court of appeals accepted the district court's determination – which was made without an evidentiary hearing requested by plaintiffs – "that the deficiencies in the treatment program did not rise to the level of constitutional violations." (Pet. App. 6a)

Thus, the court of appeals affirmed the dissolution of the injunction, even though the defendants had engaged in "backsliding" prohibited by the injunction, serious problems remained, and the court itself recognized the likelihood of new and ongoing litigation. (*See* Pet. App. 4a-5a (noting that "residents may bring new actions seeking injunctive relief" if conditions continued deteriorating)) The court of appeals denied a timely petition for rehearing or rehearing *en banc* on March 24, 2009 (Pet. App. 24a-25a).

REASONS FOR GRANTING THE PETITION

This case affords the Court an opportunity to resolve several significant questions of fundamental importance. It involves a "history-making injunction" that has proven critical in supporting the continuing constitutionality of Washington's civil commitment program, the oldest such program in the nation. The

long history of litigation at the SCC demonstrates the substantial constitutional difficulties associated with the civil commitment of sex offenders. There are compelling reasons for this Court to review the court of appeals' decision, which has broad implications not only for the residents of Washington's SCC, but also for similarly-situated individuals nationwide as well as the numerous States responsible for administering similar programs throughout the country.[3]

First, this case provides the Court the opportunity to articulate the requirements for a constitutionally-adequate civil commitment treatment program. This Court has made clear that adequate treatment is a fundamental prerequisite to any civil commitment program. *See, e.g.*, *Seling*, 531 U.S. at 261-62; *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997). Nonetheless, the Court has not defined the specific elements of a constitutionally-adequate treatment program, and the lower courts have been left with little guidance. The underlying litigation here – which has gone on for nearly two decades at all levels of the federal courts, with numerous appeals and orders imposing sanctions – demonstrates the need for this Court to clarify the standards that must be met by States seeking to treat

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[3] Several states have similar civil comment statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3701; CAL. WELF. & INST. CODE § 6600; FLA. STAT. ANN. § 394.910; 725 ILL. COMP. STAT. 207/1-99; KAN. STAT. ANN. § 59-29a01; MASS. GEN. LAWS. ch. 123A, §§ 1-16; MINN. STAT. § 253B.09; MO. ANN. STAT. § 632.480; N.J. STAT. ANN. § 30:4-27.24; N.D. CENT. CODE § 25-03.3-1 - 25-03.3-24; N.Y. MENTAL HYGIENE LAW § 10.01; S.C. CODE ANN. § 44-48-10; TEX. HEALTH & SAFETY CODE § 841; VA. CODE ANN. § 37.2-900; WIS. STAT. § 980.1-.4.

civilly-committed persons.[4] Indeed, the record shows that the courts' rulings here are internally inconsistent: the court of appeals held that the exact same deficiencies in the SCC's treatment program that it once found constituted constitutional violations no longer "rose to the level of" violations of the Constitution and did not prohibit the district court from dissolving the injunction.

Second, the court of appeals' decision conflicts with decisions of this Court, as well as other courts of appeals, regarding the standards for dissolving a civil rights injunction. The district court expressly found that the defendants engaged in prohibited "backsliding" (Pet. App. 7a), and thus violated the terms of the injunction and the court's prior orders, which specifically conditioned dissolution on a finding that there was no backsliding. Nonetheless, the district court dissolved the injunction, and the court of appeals affirmed, because the court determined that such backsliding did not itself amount to a constitutional violation. (*See* Pet. App. 5a ("Federal court intervention . . . may extend no longer than necessary to cure constitutional violations.").) However, this Court's precedents hold that ongoing constitutional violations are not required to maintain an injunction. The Court has made clear, for example, that to dissolve an injunction, a court must be assured that defendants are unlikely to "return to [their]

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[4] One potentially-related petition is currently pending before this Court. In *United States v. Comstock*, No. 08-1224 (filed April 3, 2009), the United States seeks review of the Fourth Circuit's decision holding that the newly-enacted federal civil commitment statute, 18 U.S.C. § 4248, is unconstitutional. *See United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009).

former ways" and commit constitutional violations *in the future. Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 247 (1991). Yet in the present case, the district court dissolved the injunction despite its finding of ongoing "backsliding" in violation of the injunction's express terms and its recognition that plaintiffs have a "valid concern that without judicial oversight, the SCC and its treatment program will eventually revert back" and provide constitutionally-inadequate treatment. (ER12) The court of appeals affirmed that decision, even though it specifically found that residents may have to bring future actions if the conditions of the treatment program continue to deteriorate. (*See* Pet. App. 4a) This Court should review the court of appeals' decision to clarify that in order to dissolve an injunction, the court must be assured that defendants will not repeat their unconstitutional behavior and that ongoing violations of an injunction's terms like those the district court found here are sufficient to warrant maintenance of an injunction, even if they do not "rise to the level of" an ongoing constitutional violation.

Third, the court of appeals' decision conflicts with the decisions of numerous courts of appeals holding that an evidentiary hearing must be held before the court takes action on an injunction. Numerous courts of appeals, including the Second, Third, Sixth, Eleventh and D.C. Circuits, have held that unless the facts are not in dispute, or an adverse party has waived the right to a hearing, an evidentiary hearing is a significant procedural step that cannot be ignored. *See, e.g., Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir. 2003); *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001); *Professional Plan Examiners of New*

Jersey, Inc. v. Lefante, 750 F.2d 282, 288 (3d Cir. 1984); *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745, 747 (2d Cir. 1987); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983). Review is warranted to resolve this significant inter-circuit conflict.

ARGUMENT

I. The Lower Courts Are In Need Of Guidance As To What Is Required To Establish Constitutionally-Adequate Treatment For Civilly-Committed Individuals.

This Court has made clear that civilly-committed offenders have a constitutional right to adequate treatment. *See Seling*, 531 U.S. at 265 ("due process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed"); *Hendricks*, 521 U.S. at 362-63. The Court has likewise held that civilly-committed persons must have access to treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *see also Sharp*, 233 F.3d at 1172 (civilly-committed individuals have a right to treatment that "gives them a realistic opportunity to be cured and released"). Absent such treatment and a path to potential release, civil commitment becomes criminal punishment imposed by the State without the benefit of the normal procedural guarantees afforded criminal defendants. In this regard, this Court has specifically cited the Turay Injunction as providing a basis for the

continuing validity of Washington's sex offender commitment statute. *See Seling*, 531 U.S. at 265-66 (noting that residents have a "remedy for the alleged [unconstitutional] conditions and treatment regime at the [SCC]" because "[t]he Center operates under an injunction"). The Washington statute at issue here likewise acknowledges that residents have a right to "adequate care and individualized treatment." WASH. REV. CODE § 71.09.080(2).

This Court has addressed the constitutionality of civil commitment in several cases, including *Allen v. Illinois*, *Kansas v. Hendricks*, and *Seling v. Young*. In each of those cases, although the Court made clear that civilly-committed offenders have a constitutional right to adequate treatment, it did not define the specific elements of a constitutionally-adequate treatment program. *See Seling*, 531 U.S. at 262-63, 265 (finding that constitutionally-adequate treatment is required, but because of the procedural posture of the case, failing to articulate the elements of an adequate treatment program); *Hendricks*, 521 U.S. at 362-64, 367-68 (discussing general parameters for ascertaining whether a civil commitment statute imposes "punishment" that conflicts with the due process requirement, but failing to articulate guidelines for determining whether a treatment program is constitutionally adequate); *Allen v. Illinois*, 478 U.S. 364, 373-75 (1986) (finding that courts must undertake an inquiry into the actual effects of a civil commitment statute, including whether the goal of "treatment" is manifested in practice, but failing to articulate specific elements of a constitutionally-adequate treatment program). The lower courts have therefore been left to speculate concerning what those requirements entail.

The decades of litigation over Washington's civil commitment statute is illustrative of the problems created by the lack of guidance regarding the standards that must be met by States seeking to treat civilly-committed persons. The lack of clear, identifiable standards has led to prolonged litigation and, even now, great uncertainty. Indeed, the order dissolving the injunction, and the court of appeals' decision upholding that order, conflict with the Ninth Circuit's own precedent holding that the same deficiencies in the exact same treatment program constitute constitutional violations. *Cf. Sharp*, 233 F.3d at 1171-72, *with* ER510 (IOCC report finding that the deficiencies "existed for some time *and continue to exist*") (emphasis added).

As a result, after nearly two decades of litigation, the Turay Injunction was dissolved notwithstanding defendants' long "history of noncompliance" with the injunction, *Sharp*, 233 F.3d at 1173; their "repeated and documented failures to rectify the constitutional shortcomings" at the SCC, *Cunningham*, 56 Fed. Appx. at 394; and perhaps most importantly, their *ongoing* violation of the court's orders and "backsliding" on the progress that had been made toward compliance (*see* Pet. App. 7a). The court of appeals affirmed the district court's decision dissolving the injunction despite explicitly recognizing the likelihood of future litigation over the ongoing problems at the facility. (*See* Pet. App. 4a-5a) And despite the Ninth Circuit's prior recognition that a constitutionally-adequate treatment program must provide "a realistic opportunity to be cured and released," *Sharp*, 233 F.3d at 1172, when the Turay Injunction was dissolved, the SCC had yet to successfully treat and release a single inmate in more than seventeen years.

The lack of clear, articulated standards has played a role in this prolonged and often inconsistent litigation. Future litigation, both of the kind envisioned by the Ninth Circuit (*see* Pet. App. 5a) and in other jurisdictions, can only be avoided or properly managed if the lower courts have clear guidance from this Court.

The nearly two-decade-long record of this case powerfully demonstrates the need for clear guidance. The divergent outcomes over the course of the litigation appear to have less to do with the parties' actions than they do with judicial "battle fatigue." Indeed, the situation "on the ground" at the SCC was arguably *worse* when the injunction was dissolved than it had been when earlier orders were entered enforcing the injunction. In a report submitted as part of the dissolution proceedings, the IOCC documented "persistent," "pervasive," "serious," and "significant" problems in the SCC's treatment program (ER478, 486, 491, 494, 500, 510) According to Dr. Richard Briody, the head of the IOCC, those "conclusions *go to the very heart of providing adequately and constitutionally required care for residents at the SCC.*" (ER475 (emphasis added)) Indeed, Dr. Briody opined that "[t]he problems have been so persistent that . . . improvement will not occur without external oversight and some form of continued enforcement to require compliance with the oversight body." (ER475)

Thus, despite nearly two decades of litigation, and years of injunctive relief, the IOCC continued to document a "plethora of serious problems at SCC." (ER510) This included, among other things: a lack of "[a]dequate provision of medical and psychiatric care," which was a "persistent problem" (ER473);

"procedure[s] for ensuring patient medication compliance" which are "not acceptable" (ER504); "significant concerns about the level of health care services provided by the program" (ER499); a lack of supervision, which is described as "absent or not effective" (ER480-81); "repetitive and persistent" personal sanitation and safety concerns" which "are ignored" (ER475); "dysfunctional" internal review mechanisms (ER473); significant problems with "use of force, safety violations, and allegations of staff abusing residents and medical errors" (ER508); increasing "[c]omplaints of staff abuse" (ER495); and a significant decrease in "the number of residents participating in treatment" (ER484).

As noted above and discussed in greater detail in Section II, *infra*, defendants were "backsliding" (and thereby violating the terms of the district court's orders) at the time the injunction was dissolved. Yet without clear guidelines to follow, the court of appeals affirmed, notwithstanding all of the ongoing problems mentioned above, which were the same sorts of violations that both the court of appeals and district court had previously deemed to violate defendants' constitutional right to adequate treatment. *See Sharp*, 233 F.3d at 1172-73.

Not surprisingly, the conditions at the SCC have continued to deteriorate. Thus, for example, a report by the IOCC that was released after the district court issued its decision documented numerous ongoing violations and specifically gave the SCC the lowest possible rating in three of the reviewed areas (medical records, resident protection, and health screening). (*See* 8/14/06 IOCC Report at 27, 33, 45.)

The significant problems in the SCC treatment program have also been the subject of recent media coverage. Since the district court's opinion two years ago, the SCC has been the subject of a federal criminal investigation leading to the arrest of a staff member for distribution of "a significant amount of crack cocaine" to residents. FBI Press Release, *Inmate and Employee at Special Commitment Center Arrested for Drug Distribution Conspiracy*, Aug. 1, 2008. Other FBI investigations have found several residents in the possession of "thousands of images of child pornography." *Sex Offenders At State Center Getting Porn*, The Seattle Times, Jan. 7, 2008. Despite the fact that the SCC is located on a remote island and is "surrounded by concertina wire and security cameras," as King County's lead prosecutor for sex-predator cases observed, "[t]hey've got a serious problem with contraband in that institution." *Id.* Media investigations have concluded that "corrupt staff members accepting bribes are the most likely source" of the contraband. *Investigators: Porn, Drugs Smuggled Into Center for Sexual Predators*, King 5 News, Oct. 30, 2008, *available at* http://www.king5.com/localnews/investigators/stories/NW_103008INV_mcneil_island_contraband_KS.164440e4a.html. As a result, instead of receiving treatment, "many of the residents are busy doing drugs, getting drunk, and getting their hands on pornography." *Id.* Finally, the Governor's proposed 2009-2011 operating budget contained significant cuts in the SCC program that one union official testified "will make a bad situation worse" and "could spark sanctions from the courts and the federal government because of less treatment." Testimony of Craig Gibelyou, AFSCME, before House Ways and Means Comm., Jan. 14, 2009, http://www.wfse.org/index.cfm?zone=/unionactive/view

_article.cfm&HomeID=112900. Given these ongoing problems, continued litigation regarding the adequacy of the SCC's treatment program is inevitable.

Unfortunately, the lack of specific standards has led to the situation faced by the SCC's residents today. The long and contentious history of this litigation, and the inconsistent rulings as to what is constitutionally permissible, demonstrate that the lower courts need further guidance. This Court should grant the petition in order to clarify the standards that must be met by the numerous States seeking to treat civilly-committed persons under similar programs.

II. The Court Of Appeals' Decision Conflicts With Decisions Of This Court, As Well As Other Courts Of Appeals, Regarding The Standards For Dissolving An Injunction.

More generally, the court of appeals' decision conflicts with decisions of this Court, as well as other courts of appeals, regarding the standards for dissolving a civil rights injunction. The terms of the injunction, and numerous orders of the district court, specifically conditioned dissolution on a determination that defendants had not engaged in "backsliding" that would undo the progress they had made and that was required under the injunction. (*See* ER590, 1001, 1015, 1029, 1042, 1077, 1117) Here, as the court of appeals acknowledged, the district court expressly found that defendants engaged in "backsliding" (Pet. App. 13a), and thus violated the terms of the original injunction. Nonetheless, the court dissolved the injunction, summarily stating without explanation

(and without the benefit of an evidentiary hearing)[5] that defendants' backsliding did not, standing alone, "rise to the level of a Constitutional violation." (*See* Pet. App. 13a)

The court of appeals affirmed, notwithstanding the undisputed backsliding by defendants, because it found that the ongoing problems "do[] not demonstrate a level of non-compliance requiring continued federal court involvement." (Pet. App. 5a) The court reasoned that "[f]ederal court intervention . . . may extend no longer than necessary to cure constitutional violations." (*Id.*) Thus, under the court of appeals' ruling, defendants may continue to violate the terms of a civil rights injunction, so long as the ongoing violations do not "rise to the level" of a constitutional violation. Indeed, a court may dissolve an injunction even though it concludes that defendants are likely to engage in constitutional violations in the future.

The court of appeals' decision is at odds with the very case that it cites, *Dowell*, 498 U.S. at 237. In *Dowell*, this Court made clear that in order to dissolve an injunction, the court must be assured that defendants are unlikely to "return to [their] former ways." *Id.* at 247. This rule is widely recognized and is applied by courts of appeals and district courts alike. *See, e.g.*, *Cody v. Hillard*, 139 F.3d 1197, 1199-1200 (8th Cir. 1998) ("the ultimate question" for a court seeking to dissolve an injunction "[is] whether the defendants are likely to comply with the Constitution *in the absence of court supervision*") (emphasis added).

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[5] The court's failure to hold an evidentiary hearing was itself an error worthy of this Court's review, as discussed in Section III, *infra*.

The defendants' backsliding here demonstrates that they were already "return[ing] to [their] former ways" even before the court dissolved the injunction. Indeed, both the district court and the court of appeals recognized the likelihood that defendants would not "comply with the Constitution in the absence of court supervision." *Cf. id.* at 1199-1200. As discussed in greater detail above, defendants had a long and well-recognized history of non-compliance with the court's orders and the terms of the injunction. And although the district court determined without explanation that constitutional violations were no longer present, the court emphasized that plaintiffs have a "valid concern that without judicial oversight, the SCC and its treatment program will eventually revert back to the very structure that gave rise to this lawsuit in the first place." (ER12) Indeed, the district court was emphatic on this point: "The Court recognizes that, historically, remedial action has not occurred at the SCC until defendants have been faced with an imminent status hearing before this Court. *The Court, too, is concerned that without judicial oversight, the efforts made by all parties to date may be undone.*" (*Id.* (emphasis added))

The court of appeals likewise acknowledged that "conditions at the SCC are far from ideal," that independent experts reviewing the SCC "harshly criticize[d] the current treatment program," and that there were "discouraging trends, including decreasing program participation rates and rising allegations of staff abuse." (Pet. App. 3a-4a) Indeed, the court of appeals explicitly envisioned the need for *future* litigation. (*See* Pet. App. 4a-5a (noting that "residents may bring new actions seeking injunctive relief" if conditions continued deteriorating)) The court of

appeals nonetheless affirmed the district court, under the apparent belief that it did not have the authority to continue the injunction without a finding of ongoing constitutional violations.

It is clear that defendants here were, at a minimum, "return[ing] to [their] former ways." *Dowell*, 498 U.S. at 247. It is equally clear that both the district court and the court of appeals believed that defendants were not likely to comply with the Constitution in the absence of continued judicial supervision. *Cody*, 139 F.3d at 1199-1200. (And, as discussed in Section I, *supra*, the actual events at the SCC since the injunction was dissolved demonstrate that these fears were justified.) This Court should grant the petition to make clear that a federal court can, and should, continue an injunction where the court believes that doing so is necessary to prevent defendants from returning to their unconstitutional behavior or where a party is failing to comply with the terms of the injunction.

III. The Ninth Circuit's Decision Creates A Conflict With The Decisions Of Numerous Courts Of Appeals Holding That A District Court Must Hold An Evidentiary Hearing Before Taking Action On An Injunction.

Finally, the court of appeals' decision conflicts with the decisions of numerous other circuits, which have routinely determined that a district court must hold an evidentiary hearing before taking action on an injunction. In this case, the district court failed to hold an evidentiary hearing before dissolving the injunction, notwithstanding the court's own conclusion that defendants had engaged in "backsliding" in

violation of the injunction and the court's prior orders. (*See* Pet. App. 13a) Indeed, the district court denied an evidentiary hearing even though it initially ruled that such a hearing was "necessary" before it could enter a ruling dissolving the injunction (Pet. 22a) and despite its recognition that the defendants had "fallen into a pattern of first denying that anything is amiss at SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting that shortfalls of constitutional magnitude still exist, then returning to denial." (ER1186)[6]

The court's denial of plaintiffs' request for an evidentiary hearing was particularly inappropriate because it occurred just as the IOCC was about to issue another report regarding the SCC's treatment program. Had the court held such a hearing, plaintiffs would have been able to present evidence further documenting their claims of serious and persistent constitutional violations. They would have also been able to cross-examine defendants regarding their assertions concerning the SCC's treatment program – a process which, over the course of this protracted litigation, has often been critical in determining the true state of the SCC program. (*See, e.g.*, ER1186, ER1060-61)

The court of appeals upheld the denial of an evidentiary hearing, citing the district court's conclusion that it "was not persuaded that an

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[6] The district court initially indicated that there *would* be an evidentiary hearing at which plaintiffs could present evidence regarding the defendants' backsliding (Pet. App. 22a, ER14-17, 589), but then retracted its prior determination (Pet. App. 20a-21a).

evidentiary hearing would materially alter its conclusion." (Pet. App. 6a) This contrasts sharply with the authoritative decisions of the other courts of appeals, which are in agreement that actions on an injunction require an evidentiary hearing, unless the facts are not in dispute or the adverse party has waived its right to a hearing. "It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary 'to the spirit which imbues our judicial tribunals prohibiting decision without hearing.'" *Microsoft*, 253 F.3d at 101 (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)).

Other courts of appeals have held that an evidentiary hearing is required before a court can take action on an injunction, including the Second, Third, Sixth, Eleventh and D.C. Circuits. *See Four Seasons Hotels and Resorts*, 320 F.3d at 1205 (holding that the district court abused it discretion by issuing a preliminary injunction without holding an evidentiary hearing); *Microsoft*, 253 F.3d at 101 ("Generally the entry or continuation of an injunction requires a hearing.") (citation omitted); *Lefante*, 750 F.2d at 288 ("As a general principle, the entry or continuation of an injunction requires a hearing."); *Fengler*, 832 F.2d at 747 ("On a motion for preliminary injunction, where essential facts are in dispute, there must be a hearing . . . .") (internal quotations omitted); *McGee*, 714 F.2d at 613 ("[A]n evidentiary hearing is required before an injunction may be granted.").

The evidentiary hearing is, in short, a "significant procedural step" that cannot be ignored unless "the facts are not in dispute" or "the adverse party has

waived [his] right to a hearing." *Lefante*, 750 F.2d at 288; *Microsoft*, 253 F.3d at 101 (same); *see also Four Seasons Hotels and Resorts*, 320 F.3d at 1211 (where facts are contested and credibility determinations must be made, "an evidentiary hearing must be held"); *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("[p]articularly when a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing"); *Forts v. Ward*, 566 F.2d 849, 854 (2d Cir. 1977) ("Resolution of the factual questions, most of which present credibility issues, with the benefit of cross-examination and the opportunity to observe the witnesses' demeanor on the stand, is essential.").

In the present case, the facts were in dispute and there was no waiver. Thus, an evidentiary hearing was required. The fact that the district court "was not persuaded that an evidentiary hearing would materially alter its conclusion" did not relieve it of the obligation to hold one. (*See* Pet. App. 6a) If that were the law, a court could always avoid holding a hearing by merely saying that it "is not persuaded," and the hearing requirement would be a nullity. The Ninth Circuit's holding to the contrary conflicts with the well-reasoned decisions of the other courts of appeals. This Court should grant the petition and make clear that where there are factual disputes, a district court must hold an evidentiary hearing before taking action on an injunction.

CONCLUSION

This case presents this Court with an opportunity to resolve several significant questions of fundamental importance. For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 19, 2009

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD GARRETT TURAY,
Plaintiff-Appellant

v.

HENRY RICHARDS, Ph.D.; JOHN TAYLOR-ANDERSON, individually and his marital community and in his official capacity at the Special Commitment Center at Monroe, WA; JOAN KIRCHOFF KAREN SULLIVAN; PETE HAZEL, each in their individual capacity and in their official capacity as employees of the Dept of Social and Health Services; RICHARD BOSSE, in his individual capacity and in his official capacity as an employee of the Dept. of Corrections; ANDRE SIMON; DENNIS BRADDOCK, Secretary of the Dept of Social and Health Services,
Defendants-Appellees.

No. 07-35309

Argued Oct. 20, 2008

Decided Jan. 29, 2009

Before: SILVERMAN, McKEOWN and BERZON, Circuit Judges.

Plaintiff-Appellant Richard Turay is a resident at the Washington State Special Commitment Center ("SCC"), a secure confinement and treatment facility for persons civilly committed as "sexually violent predators" under Wash. Rev. Code ch. 71.09. This

case arises from injunctive relief, first imposed nearly fifteen years ago, to remedy constitutional violations in the mental health treatment program at the SCC. Turay appeals from the district court's order dissolving the single remaining component of the injunction and discontinuing federal court supervision of the facility. Specifically, Turay argues that the SCC has not complied with the remaining components of the injunction, relating to the off-island Less Restrictive Alternative ("LRA") facility and the LRA protocol. Turay further contends that the district court erred in removing court supervision, given the SCC's backsliding since the bulk of the injunction was lifted in 2004, the SCC's history of non-compliance with court orders, and a lack of constitutionally sufficient oversight mechanisms.

We review the district court's decision to dissolve the injunction for abuse of discretion. *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994). We defer to the district court's findings of fact underlying its decision unless they are clearly erroneous. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). We affirm.

1. The district court did not abuse its discretion in dissolving the last remaining components of the injunction relating to the off-island LRA and the LRA protocol. The parties stipulated that the facility had been built and that the LRA protocol had been in place since 2004, three years before the district court's order finally dissolving the injunction. The alleged deficiencies Turay cites as evidence that the off-island LRA has

not been effective do not persuade us that the facility fails to meet the injunction's requirements.

The parties stipulated that the facility meets statutory requirements for the training of rehabilitation counselors. Given that stipulation, the facility's location close to potential employment opportunities, its sufficient current capacity to accommodate qualified LRA placements, and judge Martinez's personal inspection of the facility, we cannot say that the district court abused its discretion in holding that the SCC had complied with this last remaining component of the injunction. In particular, on this record, the district court could properly conclude that the difficulties faced by off-island LRA residents in obtaining employment are more likely the result of the residents' offense history and public notification requirements than of deficiencies in the required vocational programs.

2. Nor did the district court abuse its discretion in failing to reinstate injunctive relief relating to components of the treatment program that the district court, and this court on appeal, previously had found in compliance with the injunction. Although the evidence submitted by Dr. Briody and the IOCC demonstrate that conditions at the SCC are far from ideal, we are not persuaded that the conditions of the treatment program represent a substantial departure from professional standards, such that committed persons are denied treatment giving them a realistic opportunity to be cured or to improve their mental condition. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982);

Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1981).

The IOCC's 2006 report notes with regard to several matters that there is room for improvement in the facility's treatment program, and also reports some discouraging trends, including decreasing treatment program participation rates and rising allegations of staff abuse. Ultimately, however, the IOCC report does not conclude that any particular component of the program fails to meet minimum standards. Also, the SCC officials responding to the IOCC's observations offer explanations that mitigate the negative implications of some of the IOCC's criticisms. For instance, the SCC officials provide alternative explanations for the decline in the treatment program participation rates and identify plausible reasons for the increases in abuse complaints other than an increase in actual abuse. For example, SCC officials suggest that residents used the abuse complaints system to assert more mundane concerns that had previously gone through the grievance system. The district court was entitled to credit those explanations.

Furthermore, although the IOCC report as well as Dr. Briody's declaration harshly criticize the current treatment program, they do not identify significant ways in which the program has deteriorated since 2004, when the district court adjudged the program to be in compliance with the injunction, in a decision this court upheld on appeal. Finally, as the district court observed, residents may bring new actions seeking injunctive relief if the conditions of the

treatment program deteriorate to below constitutional standards.

3. The district court also acted within its discretion in refusing to reinstate injunctive relief because of the SCC's past history of non-compliance with prior court orders. We have observed, including in the context of the Turay Injunction, that a history of non-compliance can justify greater court involvement in the supervision of a government program than would otherwise be appropriate. *See Sharp*, 233 F.3d at 1173. But the recent history of the Turay Injunction does not demonstrate a level of non-compliance requiring continued federal court involvement.

Previous court-imposed sanctions were eliminated in 2004. In both its 2004 and 2005 orders, the district court noted the SCC's progress and good faith efforts to comply with the remaining requirements of the injunction. Federal court intervention in state institutions is a temporary measure and may extend no longer than necessary to cure constitutional violations. *See Bd. of Ed. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991); *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986). The district court therefore did not abuse its discretion in failing to order injunctive relief anew based solely on past history of substantial non-compliance.

4. The district court also considered Turay's concerns about the inadequacy of oversight mechanisms at the SCC and acted within its discretion in dissolving the injunction notwithstanding these concerns. The district court had previously determined that the oversight

mechanisms satisfied constitutional demands. The alleged deficiencies cited by Turay do not demonstrate that the treatment program suffers from constitutionally inadequate oversight. Nothing in the record establishes that any of the existing oversight mechanisms will be discontinued in the absence of court supervision. It was not an abuse of discretion for the district court to deny continuing supervision on the ground that oversight could become deficient in the future.

5. Finally, the district court did not abuse its discretion in failing to hold an evidentiary hearing on the issue of backsliding. After reviewing the evidence submitted, including the IOCC report and Dr. Briody's declaration, the district court was not persuaded that an evidentiary hearing would materially alter its conclusion that the deficiencies in the treatment program did not rise to the level of constitutional violations. *See In re Aimster copyright Litigation*, 334 F.3d 643, 653-54 (7th Cir. 2003). In fact, the district court concluded that even if Turay could prove all of the allegations he raised, none of them would amount to a constitutional violation. The evidence before the district court adequately supports this view, particularly the failure of the IOCC report to identify any specific areas in which the treatment program's performance failed to meet minimum standards. We therefore hold that the district court acted within its discretion in refusing to hold an evidentiary hearing on the issue of backsliding.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD TURAY, *et al.*,

Plaintiffs

v.

HENRY RICHARDS, PhD., *et al.*,

Defendants

Case No. C91-0664RSM

I. Introduction

This matter comes before the Court on defendants' Motion to Dissolve Injunction. (Dkt. #2047). At stake is the dissolution of a history-making injunction, and the conclusion of years of litigation between the parties. The Court does not make this decision lightly, and has spent considerable time reviewing the parties' briefing, as well as the prior decisions made in this case over the last 15 years. However, having reviewed defendants' motion, plaintiffs' responses, and the remainder of the record, this Court now finds that the injunction should be DISSOLVED and this case DISMISSED for the reasons set forth below.

II. Background

The court will not repeat the lengthy procedural and factual background of this case. The parties, the

Court and the public are by now well-versed in what has taken place over the course of this litigation. However, the Court sets forth a brief history to set the context for the instant motion.

Plaintiffs are residents of Washington's Special Commitment Center ("SCC"), who were civilly committed as "sexually violent predators." Defendants are the superintendent and clinical director of the institution in their official capacities as representatives of the State. SCC resident Richard Turay, now proceeding *pro se*, initially brought this action, claiming that the conditions of his confinement violated his civil rights. A trial was held in 1994, and the jury found that the SCC was not providing Turay and other residents constitutionally adequate mental health treatment. Turay received nominal damages, and the Honorable William L. Dwyer, United States District Judge, issued an injunction requiring the SCC to bring the treatment program into compliance with constitutional requirements. The injunction was broad, and directed defendants to adopt and implement a plan for hiring and training competent therapists; implement strategies to rectify the lack of trust between the residents and staff; implement a general treatment program for residents, including involvement of spouses and family members and all other generally accepted therapy components; develop individual treatment plans for each resident to measure progress; and provide an expert in treatment of sex offenders to supervise and consult with treatment staff.

Over the course of many years, this Court monitored compliance with that injunction. In addition, to effectively conduct that monitoring, the Court appointed a special master, reviewed periodic compliance reports, and held numerous evidentiary hearings. Meanwhile, another group of SCC residents also brought a court action seeking damages and injunctive relief relating to the confinement conditions, which was subsequently combined with the Turay case.

In October 1998, Judge Dwyer conducted an evidentiary hearing pertaining to the injunctive relief issues. In November 1998, the Court issued a lengthy order, finding that the SCC had still not complied with constitutional requirements, and set forth a detailed list of items remaining to be addressed. Those items included, *inter alia*, additional staff training at the SCC; provision of a coherent and individualized treatment program for each resident; adequate provision for participation by the residents' families in rehabilitation efforts; construction of a separate treatment-oriented facility; elimination of the routine strip searches of SCC residents following every visit; elimination of the monitoring of residents' telephone calls and the bar on outgoing calls; negotiation with McNeil Island Correction Center ("MICC") management to obtain better meal and activity schedules; improvement to the treatment environment; and the initiation and implementation of program oversight both by an internal review process and by an external body. Defendants appealed from that Order, but the Ninth Circuit Court of Appeals affirmed, holding that there had been no error in the Court's conclusion that the

SCC was still not providing the adequate treatment that is constitutionally required for civilly-committed persons. *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000). The Court of Appeals also found that the Court did not abuse its discretion with respect to the scope of the Order. *Id.* at 1174.

In November 1999, Judge Dwyer held defendants in contempt for failing to take all reasonable steps within their power to comply with the injunction. As a result, contempt sanctions began accruing, and continued to accrue for the next several years.

In June 2004, after several additional compliance hearings and other proceedings, the Honorable Robert S. Lasnik, United States District Judge, determined that:

> 4. With one exception, . . . defendants' activities during the past year generally involved the selection of alternatives based on their impact on treatment and that those decisions fall well within professional standards. Under the direction of qualified and experienced professionals, the SCC has continued to improve and develop the vocational and educational opportunities available to residents, provides treatment to Special Needs residents that offers an opportunity to improve conditions for which they are confined, and has developed and implemented a plan to address deficiencies related to progress notes and treatment plans. Defendants have substantially complied with the

> requirements of the injunction with regards to vocational programming, Special Needs programming, and charting requirements [.]
>
> 5. The one area where defendants' activities do not accurately reflect professional judgment involves the development and funding of an off-island LRA. Circumstances outside the control of the SCC professionals have delayed the development of an off-island SCTF despite the acknowledged need for such a facility to guarantee minimum professional treatment for those residents who qualify.

(Dkt. #1906 at 7-8).

Judge Lasnik then purged the 1999 contempt order, found that the accrued sanctions need not be paid, and narrowed the injunction to the development and funding of off-island LRAs and the administration of the LRA protocol. Judge Lasnik also directed that "[p]rovided there is no significant 'backsliding,' the Court will dissolve the injunction when defendants have completed or substantially completed construction of an off-island SCTF such that its ultimate readiness for occupancy is assured." (Dkt. #1906 at 10). The Ninth Circuit Court of Appeals has affirmed Judge Lasnik's Order. *Cunningham v. Weston*, 180 Fed. Appx. 644, 2006 U.S. App. LEXIS 11941 (9th Cir. May 9, 2006).

Since that time, the parties have submitted stipulated facts pertaining to the development and

construction of an off-island LRA. Indeed, there is no dispute that such facilities now exist, and are currently located in both Pierce and King counties. Both facilities currently house residents, and are assisting those residents with plans to transition back into the community.[1]

Defendants now move for the complete dissolution of the injunction, arguing that the only remaining issue has been resolved. Plaintiffs, both represented and *pro se*, ask the Court to find that there has been significant backsliding and continue to monitor compliance with the 1998 Order.

III. Discussion

A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction. *See Sharp*, 233 F.3d at 1170; *Bellevue Manor Assocs. v. Untied States*, 165 F.3d 1249, 1255 (9th Cir. 1999) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). Here, defendants note that it is undisputed that they have met the last requirement of the injunction, and argue that such fulfillment mandates dissolution and dismissal of this action. Thus, this Court is required to examine the existing SCTF and LRA protocol to determine whether the developments are so significant as to warrant an end of court supervision.

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[1] The undersigned district Judge has toured the King County facility with the presence of plaintiffs' and defendants' counsel.

Sharp, 233 F.3d at 1170. Further, this Court acknowledges that it should show deference to the judgment exercised by a qualified professional, in order to minimize the interference by the federal judiciary with the internal operations of state institutions. *See Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). "A decision made by a professional is presumptively valid, and 'liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.'" *Sharp*, 233 F.3d at 1171 (citation omitted).

Plaintiffs, both represented and *pro se*, do not appear to dispute that defendants have complied with the final area of the injunction identified by Judge Lasnik. Instead, plaintiffs focus on the issue of "backsliding," arguing that this Court must maintain supervision over the SCC because there continues to be inadequate oversight and there has been real and harmful backsliding. Plaintiffs assert that because of that backsliding, defendants are no longer in compliance with the 1998 Order.

The Court has already determined that, while plaintiffs have demonstrated that some backsliding has occurred with respect to the treatment program at issue in this case, and even assuming plaintiffs could prove all of the allegations raised in their briefs, those allegations would not rise to the level of a Constitutional violation requiring this Court to reinstate the injunctive relief previously granted by

this Court. (Dkt. #2096). The Court further addresses that decision here.

As the Ninth Circuit has explained, the appropriate legal standard for analyzing the constitutionality of SCC's treatment program is set forth in *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980). *Sharp*, 233 F.3d at 1172. In *Ohlinger*, the Court of Appeals held that the Fourteenth Amendment Due Process Clause requires states to provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released. *Id.* Because the purpose of confinement is not punitive, the state must also provide the civilly-committed with "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 322.

Plaintiffs first focus on what they characterize as the declining participation in treatment at the SCC. Plaintiffs argue that there has been significant decline between 2005 and 2006, and conduct a point by point review of the Inspection of Care Committee's ("IOCC") yearly treatment reports for those years. (Dkt. #2062 at 5-8). Plaintiffs further highlight Dr. Robert Briody's concerns about the adequacy of the treatment being provided. However, the Court may not focus solely on one professional opinion in complete disregard of others. Indeed, in *Youngberg*, the U.S. Supreme Court cautioned the courts reviewing treatment programs, explaining that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to

specify which of several professionally acceptable choices should have been made." *Youngberg*, 457 U.S. at 321. In this case, neither the 2006 IOCC report, nor Dr. Briody's testimony identifies substantial departures from minimally accepted standard across the profession, especially in light of the testimony provided by other professionals highlighting the ongoing efforts by the SCC program managers to improve the program, the underlying reasons for choices to discontinue certain aspects of the program, such as the Resident Advisory Council, efforts to make changes designed to encourage participation in the treatment program.

The *pro se* plaintiffs continue to focus on the past rulings of this Court, alleging that nothing has really improved, and that their commitment has become more punitive than it was previously. Plaintiffs focus on many of the same treatment program issues highlighted by the represented plaintiffs. Plaintiffs also place great weight on the recent Ninth Circuit Court of Appeals' decision in *Hydrick v. Hunter*, 449 F.3d 978 (9th Cir. 2006). In *Hydrick,* the court addressed a challenge brought by approximately 600 civilly-committed people, and those awaiting commitment, at Atascadero State Hospital pursuant to California's Sexually Violent Predator's Act. *Hydrick*, 449 F.3d at 986. In particular, the court was reviewing an order from the district court denying defendants' motion to dismiss based on qualified immunity. Because of the posture of that decision, much of the analysis is inapposite to the instant case. In *Hydrick*, the court was determining whether certain rights were clearly established under federal law under a qualified immunity

analysis. That is much different than what this Court is charged with on the instant motion. Thus, this Court does not place the same reliance on *Hydrick* as urged by plaintiffs.

Plaintiff also urge the court to ensure that adequate external oversight of the SCC exists before judicial oversight ends. Plaintiffs argue that the current oversight mechanisms are not working and cannot be expected to be successful if there are not additional changes. The Court has twice determined that defendants have satisfied the oversight requirement. Further, the 2005 IOCC report concluded that the oversight mechanisms "meets expectations in all areas." (Dkt. #2064, Ex. 1). Thus, the Court is not persuaded that inadequate oversight mechanisms have denied any of the plaintiffs constitutionally inadequate treatment.

Having concluded that none of plaintiffs' allegations, even if accepted as proven, persuade the Court that significant backsliding has given rise to constitutional violations, the Court finds no basis to deny defendants' injunction. As noted above, the parties have submitted stipulated facts demonstrating that the last area remaining under the injunction has been successfully met. Accordingly, the Court now dissolves the injunction in its entirety and finds that judicial oversight is no longer necessary in this action.

The Court had asked the parties to address any preclusive effect this Order may have on future cases in this Court. Having reviewed the parties' positions, the Court declines to make any specific determination, and notes only that nothing in this

Order prevents plaintiffs from filing new allegations under new case numbers. The parties will then address those allegations in the normal course of litigation.

This case has been troublesome to the Court in that there seems to be no right answer, and no good fix for the situation these plaintiffs face at the SCC. The Court can do its best to ensure adequate treatment and facilities, but ultimately must succumb to the limitations of the law. As the U.S. Supreme Court has noted, injunctions against the state are not intended to operate in perpetuity. *Board of Ed. of Okla. City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991). Indeed, this Court has previously recognized that federal courts are subject to highly restrictive rules of law, and are cautioned not to impose injunctions against the state unless necessary and, even then, to make the injunction as narrow as possible. (Dkt. #1906 at 8). Accordingly, the Court must conclude that the time has come to dissolve the injunction. The Court agrees that defendants have worked long and hard to meet the constitutional requirements identified by this Court, and there is no longer any basis for the Court's continued oversight.

IV. Conclusion

Having reviewed the record, the Court hereby ORDERS:

(1) Defendants' Motion to Dissolve the Injunction (Dkt. #2047) is GRANTED. The Court adopts the stipulated facts set forth in defendants' motion, and accepts the factual representations made in the

subsequent periodic compliance reports with respect to the SCTF and LRA protocol. (Dkts. #2047, #2113, #2114, #2115, #2116 and #2117). Accordingly, the Court DISSOLVES the injunction in its entirety, and this case is now CLOSED.

(2) The Clerk SHALL forward a copy of this Order to *pro se* plaintiffs and to all counsel of record.

DATED this 23rd day of March, 2007.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD TURAY, *et al.*,
Plaintiffs,

v.

HENRY RICHARDS, Ph.D., *et al.*,
Defendants.

Case No. C91-0664RSM

This Order follows the most recent Order by this Court which determined that a hearing pertaining to the issue of backsliding is necessary and advised the parties that further direction would come regarding the scope of such hearing. (Dkt. #2091). For the past several months the court has grappled with the issue of backsliding. At stake is the dissolution of a history-making injunction, and the conclusion of years of litigation between the parties in this Court. The Court does not make this decision lightly, and has spent considerable time reviewing the parties' briefing, as well as the prior decisions made in this case over the last 15 years.

Having reviewed the record, the court now comes to the following conclusions:

1. While plaintiffs have demonstrated that some backsliding has occurred with respect to the treatment program at issue in this case, the Court finds that, even assuming plaintiffs could prove all of the allegations raised in their briefs, those

allegations would not rise to the level of a Constitutional violation requiring this Court to reinstate the injunctive relief previously granted by this Court. As a result, this Court does not plan on disturbing Judge Lasnik's prior Order dissolving all but one area of the injunction. Accordingly, the hearing will not encompass any arguments pertaining to those areas of the injunction that have already been dissolved, nor will the Court entertain plaintiffs' arguments pertaining to continued oversight of the SCC and its treatment program by this Court.

2. The Court acknowledges plaintiffs' valid concern that without judicial oversight, the SCC and its treatment program will eventually revert back to the very structure that gave rise to this lawsuit in the first place. The Court recognizes that, historically, remedial action has not occurred at the SCC until defendants have been faced with an imminent status hearing before this Court. The Court, too, is concerned that without judicial oversight, the efforts made by all parties to date may be undone. Accordingly, the Court would like to hear argument from the parties to date may be undone. Accordingly, the Court would like to hear argument from the parties on the issue of future constitutional challenges such as the instant action, and available remedies to potential plaintiffs. For example, if this Court was to dissolve the injunction and dismiss this case, would such action preclude any potential future plaintiff from filing a new action in this Court alleging a constitutional violation or violations? Will a potential future plaintiff be estopped from making

some other collateral challenge related to or arising from this litigation?

3. In addition, the Court will address the sole remaining area of the injunction — LRA facilities and the off-island SCTF — and invites any argument by the parties on that issue. Furthermore, the Court would like to arrange a visit by the undersigned District Judge and his staff to the site of the King County SCTF prior to the hearing.

4. The Court will contact the parties with proposed dates for the hearing. Once the hearing is set, the Court will issue a briefing schedule as to the issues noted above within the scope of the hearing.

5. The Clerk SHALL forward a copy of this Order to *pro se* plaintiffs and to all counsel of record.

DATED this 26th day of July, 2006.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD TURAY, *et al.*,
Plaintiffs,

v.

HENRY RICHARDS, Ph.D., *et al.*,
Defendants.

Case No. C91-0664RSM

The following MINUTE ORDER is made at the direction of the Court and by the Honorable Ricardo S. Martinez:

On May 30, 2006, this Court informed the parties that on or about June 12, 2006, it would advise them as to whether a hearing is necessary on the issue of backsliding and, if so, the scope of such hearing. The Court has determined that a hearing is NECESSARY. The Court will advise the parties as to the scope of such hearing in a subsequent Order to be issued shortly.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

RICHARD G. TURAY,
Plaintiff,

v.

HENRY RICHARDS, *et al.*,
Defendant.

No. C91-664RSM

...

THE COURT: Counsel, thank you for your presentations. Thank you for your written submissions prior to the hearing this morning.

Let me conclude by saying one thing. That is that the sense of frustration obviously felt by Mr. Turay and the residents of SCC, that is to some extent shared by this Court as well.

A long history to this case. The issues are serious. The appropriate solutions appear difficult at best. You are not going to get a decision very quickly on this. I have not decided what this Court is going to do. I will look at it very carefully.

But I thank you for the oral presentation this morning. I will look carefully at all of this, take it under advisement and will issue the appropriate order. Thank you.

Adjourned.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD GARRETT TURAY,
Plaintiff-Appellant

v.

HENRY RICHARDS, Ph.D.; JOHN TAYLOR-ANDERSON, individually and his marital community and in his official capacity at the Special Commitment Center at Monroe, WA; JOAN KIRCHOFF KAREN SULLIVAN; PETE HAZEL, each in their individual capacity and in their official capacity as employees of the Dept of Social and Health Services; RICHARD BOSSE, in his individual capacity and in his official capacity as an employee of the Dept. of Corrections; ANDRE SIMON; DENNIS BRADDOCK, Secretary of the Dept of Social and Health Services,
Defendants-Appellees.

No. 07-35309

D.C. No. CV-91-00664-RSM
Western District of Washington, Seattle

Before: SILVERMAN, McKEOWN and BERZON, Circuit Judges

The panel judges have voted to deny appellant's petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition

for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc are DENIED.

DATED this 24th day of March, 2009.